18-2380

To Be Argued By:
DANIEL C. RICHENTHAL

United States Court of Appeals
FOR THE SECOND CIRCUIT
Docket No. 18-2380

UNITED STATES OF AMERICA,
Appellee,

—v.—

SHELDON SILVER,
Defendant-Appellant,

THE NEW YORK TIMES COMPANY,
NBCUNIVERSAL MEDIA, LLC,
Intervenors.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Sheldon Silver appeals from a judgment of conviction entered on July 27, 2018, in the United States District Court for the Southern District of New York, following a two-week jury trial before the Honorable Valerie E. Caproni, United States District Judge.

Superseding Indictment S1 15 Cr. 93 (VEC) was filed on April 23, 2015, in seven counts. Counts One and Two charged Silver with honest services mail and wire fraud, respectively, in connection with a scheme

to provide official action in exchange for valuable information on mesothelioma patients and resulting fees (the "Asbestos Scheme"), in violation of 18 U.S.C. §§ 1341, 1343, 1346, and 2. Counts Three and Four charged Silver with honest services mail and wire fraud, respectively, in connection with a scheme to provide official action in exchange for valuable real estate business and resulting fees (the "Real Estate Scheme"), in violation of 18 U.S.C. §§ 1341, 1343, 1346, and 2. Counts Five and Six charged Silver with extortion under color of official right in connection with the Asbestos and Real Estate Schemes, respectively, in violation of 18 U.S.C. §§ 1951 and 2. Count Seven charged Silver with engaging in monetary transactions in criminally-derived property, in violation of 18 U.S.C. §§ 1957 and 2.

Silver's first trial commenced on November 2, 2015, and ended on November 30, 2015, when the jury found Silver guilty on all counts. On May 3, 2016, the District Court sentenced Silver principally to a term of 12 years' imprisonment, to be followed by three years' supervised release.

Silver appealed. While his appeal was pending, the Supreme Court, in *McDonnell v. United States*, 136 S. Ct. 2355 (2016), adopted a definition of "official act" not reflected in the jury instructions at Silver's first trial. This Court rejected Silver's challenges to the sufficiency of the evidence, but vacated and remanded on the ground that failure to instruct the jury in accordance with *McDonnell*'s "official act" definition was not harmless beyond a reasonable doubt. *See United States v. Silver*, 864 F.3d 102, 119-24 (2d Cir. 2017).

Silver's second trial commenced on April 30, 2018 and ended on May 11, 2018, when the jury returned a verdict of guilty on all counts.

On July 27, 2018, the District Court sentenced Silver to concurrent terms of seven years' imprisonment and three years' supervised release, and ordered him to forfeit more than $3.5 million and pay a $1.75 million fine.

Silver sought bail pending appeal before the District Court, which denied his motion, and then this Court, which stayed Silver's surrender until seven days after the merits panel deems this appeal submitted for decision.

Statement of Facts

As the longtime Speaker of the New York State Assembly (the "Assembly"), Silver was one of New York's most powerful public officials. Silver abused that power to enrich himself through two long-running schemes in which he solicited and received bribes and extortion payments in the form of referral fees in exchange for agreeing to take and taking official actions. Silver's schemes netted him millions of dollars in corrupt payments.

In the Asbestos Scheme, Silver agreed to take, and did take, official acts on behalf of Dr. Robert Taub, a prominent mesothelioma doctor, in exchange for lucrative leads to patients with mesothelioma sent to Silver at a law firm where Silver was "of counsel." The scheme began with a specific request from Silver in 2003, continued for years, and generated approxi-

mately $3 million in profits for Silver. As discussed below, Dr. Taub testified that he gave Silver mesothelioma leads as part of an "implicit understanding" between the two men. That testimony—which Silver did not challenge at trial and does not mention in his brief on appeal—was consistent with Dr. Taub's contemporaneous explanation of his corrupt relationship with Silver. Dr. Taub wrote, in 2010, years after he started giving Silver mesothelioma leads, and years before Silver's arrest, "I will keep giving cases to Shelly [Silver] because I may need him in the future—he is the most powerful man in New York State." (A. 1775).[1]

In the second of the two schemes—the Real Estate Scheme—Silver agreed to take, and did take, official action to benefit two large real estate developers in exchange for hundreds of thousands of dollars in referral fees. Specifically, through an arrangement with Jay Arthur Goldberg, a former Assembly staffer and friend of Silver who worked in the tax certiorari field, Silver arranged to receive a portion of any fees that Goldberg's law firm received from business Silver steered to the firm. Silver then used the power of his office, and the promise and threat of official action, to convince the developers to send their tax certiorari business to Goldberg's firm.

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[1] "Tr." refers to the trial transcript; "Br." refers to Silver's brief on appeal; "SA" refers to the special appendix filed with that brief; "A." refers to the joint appendix; and "Add." refers to the addendum to this brief.

Silver persisted in his schemes for more than a decade, and used lies to conceal them from the Assembly and the public. He consistently (and falsely) told the public, among other things, that he earned outside income as a lawyer by representing ordinary individuals who sought him out in "the community" because of his longstanding reputation as a personal injury lawyer.

Silver also repeatedly engaged in financial transactions of greater than $10,000 involving the proceeds of his unlawful schemes by transferring the proceeds into lucrative private investment vehicles. Through these investments, Silver was able to grow his illicit bribes and extortion payments into additional ill-gotten gains.

A. The Government's Case

1. Silver's Power as Speaker of the Assembly

As Speaker of the Assembly for decades, Silver had unrivaled power within the chamber. He controlled which pieces of legislation, out of the 12,000 bills introduced each year, made it to the floor of the Assembly for a vote. (A. 404-05). Silver also controlled the budget and committee assignments. (A. 405, 525-26).

And he controlled various discretionary funds, including the Health Care Reform Act ("HCRA") Assembly Pool, a fund containing millions of dollars in public money that Silver could use to designate grants for health care purposes. (A. 528). Silver's control over HCRA funds at relevant times was absolute. No other member of the Assembly had the power to disburse

HCRA funds without Silver's blessing. (*Id.*). His decisions on disbursement were not subject to challenge. (*Id.*). Nor were they subject to public disclosure between 2000 and 2006. (*Id.*). As a consequence, Silver could, and did, spend public funds, for whatever reason, without notifying the public or identifying the legislator who had prompted the disbursement. (A. 529).

As Speaker, Silver also controlled one of three voting positions on the Public Authorities Control Board ("PACB"), which had the power to authorize tax-exempt state financing sought by real estate developers. The other two voting members of the PACB were designees appointed by the Governor and the Senate Majority Leader. (A. 921). Silver appointed himself as the Assembly representative. (*Id.*). PACB approvals must be unanimous (A. 807, 921), and items can be removed from PACB agendas by any voting member without explanation (A. 922). Silver accordingly possessed effective veto authority over billions of dollars of state financing. He used that power to defeat projects he did not favor (such as the West Side Stadium project in Manhattan and a proposal to redevelop Penn Station). (A. 922-23, 1783, 1786, 2139). And, as explained below, Silver used that same power to further his corruption.

2. The Asbestos Scheme

In 2002, Silver became "of counsel" to Weitz & Luxenberg ("W&L"), a law firm that specialized in, among other things, litigating cases involving an asbestos-caused disease called mesothelioma—a form of cancer that is invariably fatal. (A. 631, 633). Silver was

a lawyer by training, but had no experience litigating mesothelioma cases, which are uniquely complex and, when successfully prosecuted, yield multi-million-dollar settlements and verdicts. (A. 426-27, 633). W&L paid Silver $120,000 per year but did not expect him to perform any legal work. (A. 635-36). Silver was nonetheless well aware that he could earn lucrative fees by steering mesothelioma cases to the firm, potentially netting Silver hundreds of thousands of dollars per case. (A. 433).

Silver seized the opportunity to enrich himself in the fall of 2003, when he encountered Dr. Robert Taub, a physician-researcher at Columbia University who specialized in mesothelioma. (A. 445). Silver was introduced to Dr. Taub at a Passover celebration by their mutual friend Daniel Chill.[2] Dr. Taub, knowing that Silver was of counsel at W&L, asked Silver for his help obtaining mesothelioma research funding from W&L for the Mesothelioma Applied Research Foundation, an organization with which Dr. Taub was affiliated. Silver declined. (A. 445). However, days later, Chill approached Dr. Taub with a message from Silver. Chill told Dr. Taub: "Shelly wants cases." (A. 446). Dr. Taub understood that Silver wanted him to refer his mesothelioma patients to W&L, something that Dr. Taub

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[2] Dr. Taub had previously, and briefly, met Silver, through Chill, in 1984 at a similar Passover gathering. (A. 444). Dr. Taub and Silver had no interactions in the nearly two decades that elapsed between 1984 and 2003. (A. 445).

had never done before. (A. 488). Dr. Taub further understood that breaking his longstanding practice and sending cases to Silver at W&L would make Silver a "rainmaker" and ultimately "profit him." (A. 446).

Dr. Taub agreed to Silver's request, and so began a *quid pro quo* relationship that would span nearly a decade. In November 2003, Dr. Taub began referring cases to Silver. (A. 429-30, 1834). The referral process itself was perfunctory. Dr. Taub would simply call Silver at his Assembly office and provide Silver with a name and contact information for a patient seeking legal representation. Silver would write down the information on a Post-it Note. (A. 428). These calls typically lasted less than two minutes. (A. 494). And they were the primary manner in which Dr. Taub and Silver interacted. As Dr. Taub explained, Silver was never a "personal friend," and their conversations "were pretty much always about referrals" (A. 490).

Soon after he began receiving referrals from Dr. Taub, Silver once again used Chill to send Dr. Taub messages about what Silver wanted. In December 2003, after Dr. Taub mentioned to Chill that the World Trade Center area was within Silver's district and affected by asbestos exposure, Silver instructed Dr. Taub (through Chill) to write a letter seeking state funding for mesothelioma research. (A. 447). Dr. Taub complied with the request, and sought $250,000 for his research center at Columbia. (A. 489, 495). Instead of granting the request immediately, however, Silver waited for Dr. Taub's referrals to bear financial fruit. That happened in 2005, when Silver received his first referral fee check from W&L, for more than $175,000,

all from Dr. Taub's referrals. (A. 620-21, 1765-69, 1840). That was more money than Silver's annual salary as Speaker. (A. 932). Only then, after Silver had profited from Dr. Taub's referrals, did Silver use his power to direct $250,000 in public funds (from the HCRA Assembly Pool) to Dr. Taub. (A. 1225). In November 2006, Silver directed a second $250,000 grant to Dr. Taub out of the same HCRA Assembly Pool. (A. 1236). These payments were made secretly, without disclosure to other Assembly members or constituents—many of whom resided in a lower Manhattan district exposed to asbestos after the September 11th attacks and thus presumably would have approved of Silver's support for mesothelioma research. (A. 433, 722). Silver never asked Dr. Taub about his research, or the health of the patients Dr. Taub had referred. (A. 494).

Once the *quid pro quo* relationship was cemented, Silver instructed Dr. Taub to no longer speak with Chill about the referrals. (A. 494). This was no accident. Chill was the only person who knew of the *quid* (Dr. Taub's referrals) and the *quo* (Silver's official action) that implicated Silver in a criminal scheme. For his part, Chill asked Dr. Taub to delete all references to his name in Dr. Taub's requests for state funding. (A. 495; *cf.* A. 1248 (draft request letter referencing "Mr. Daniel Chill")).

Over the next ten years, Dr. Taub and Silver had what Dr. Taub called an "implicit understanding"—that is, an agreement—in which, in exchange for the mesothelioma referrals, Silver would use his official powers to be a so-called "advocate" for mesothelioma.

(A. 489). Dr. Taub explained that this "understanding came about" when Dr. Taub learned that "Shelly wants cases" after having denied Dr. Taub's initial request for funding. (A. 516). As Dr. Taub put it, he understood that "Mr. Silver felt that if I referred patients to [W&L] through him . . . , he would be incentivized to be an advocate for mesothelioma research and to help mesothelioma patients." (A. 489). Dr. Taub also testified about all the myriad ways he believed that Silver, as Speaker, could use his official position to be an advocate for mesothelioma:

> As a legislator, he could help mesothelioma patients in a variety of ways. For example, he could help regulate laws relating to asbestos production or asbestos use, and particularly asbestos inspections within the state, which were weak at the time. He could influence legislation to help support research in cancer in general and mesothelioma in particular. He could also help, for example, regulate insurance companies in the state so that they would not balk at supporting clinical trials[.]

(*Id.*). Dr. Taub further explained that while he did not, at the time, know exactly when Silver would use his power as Speaker to be an advocate, he "thought that, however, the occasions might arise where a legislation would be important, and if he could impact, that would be a help." (*Id.*).

In 2007, state law and policy changed to require public disclosure of future HCRA grants and disclosure to the Attorney General of any potential conflicts of interest between legislators and recipients of legislative grants—conflicts that would have included Silver's *quid pro quo* relationship with Dr. Taub. (A. 596-97). Even though Silver still had access to HCRA funding after these changes took effect (A. 547), he informed Dr. Taub that he could not grant a third request for $250,000 (A. 500). But the *quid pro quo* relationship continued. Dr. Taub continued to send mesothelioma referrals to Silver because, as Dr. Taub put it, "he was a very powerful man and there were other ways in which he could assist in helping mesothelioma patients."[3] (*Id.*). The acts Silver performed and agreed to perform for Dr. Taub thereafter took different forms. Silver directed a $25,000 state grant to an organization led by Dr. Taub's wife. (A. 501-02, 540-41). He also used his influence to benefit Dr. Taub's children by, for example, helping Dr. Taub's daughter obtain a summer internship with a state judge who had previously only received one hiring recommendation from Silver (to hire Silver's mother-in-law). (A. 500, 650-51).

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[3] Contrary to Silver's suggestion (*see* Br. 24-25), the Government did not limit its Asbestos Scheme theory to an exchange of referrals for HCRA funds, and Dr. Taub's testimony, which Silver did not challenge, made clear that the agreement extended well beyond that.

When, in 2010, Dr. Taub started sending mesothelioma referrals to a law firm that competed with W&L for business and had agreed to provide $3.15 million in funding for Dr. Taub's research, Silver appeared uninvited at Dr. Taub's office to complain about the dip in referrals to Silver's firm. (A. 503-05). This and other encounters underscored for Dr. Taub the need to keep the referrals flowing to Silver, even though the HCRA grants had ceased:

> I felt that Mr. Silver still felt that if cases were referred to him, he would continue to be incentivized to be an advocate for mesothelioma research if the occasion arose, and that he would still be inclined to help raise funds for mesothelioma research. And I believed if I stopped the referrals, this might cause him to cease those activities and perhaps be a little bit alienated as well.

(A. 505). Dr. Taub echoed this view of Silver's official power, and the reason for the continued referrals, in a contemporaneous email he sent a close friend and colleague soon after Silver's visit: "I will keep giving cases to Shelly [Silver] because I may need him in the future —he is the most powerful man in New York State." (A. 1775). Silver, for his part, left Dr. Taub's office "unconcerned" about the decreased referrals. (A. 610). He assured W&L's managing partner that the decrease in referrals would stop and that the referrals would, in fact, increase. (*Id.*).

The evidence at trial demonstrated that Silver was "unconcerned" because he knew that Dr. Taub would

continue to exchange mesothelioma leads for the possibility of future funding and Silver's continued provision of official acts benefitting Dr. Taub and his family. In May 2011, Silver sponsored an Assembly resolution (a type of legislation) honoring Dr. Taub. (A. 506-07). Silver used his official power to direct his staff to prepare the resolution (and a proclamation) on an unusually rushed basis in order to protect his relationship with Dr. Taub from the rival law firm that had agreed to fund Dr. Taub's research. (A. 704-06). Silver's show of official power achieved its desired effect. As the head of the rival law firm testified, he noticed only two things on Dr. Taub's office walls: pictures of his family and Silver's official proclamation. (A. 717). According to this witness, Dr. Taub was "very proud" of the proclamation, which was "prominently displayed" and "stood out, golden" in Dr. Taub's office. (*Id.*).

In August 2011, Dr. Taub asked Silver to help him secure necessary permits for a charity run in lower Manhattan, which had a moratorium on such events. Dr. Taub testified that he sought Silver's assistance because he was "a powerful man in the state" and that he wanted Silver "to get it done, facilitate it and arrange for it to get done." (A. 508). Silver agreed to help. (A. 509). In exchange for that help, Dr. Taub understood that Silver would expect additional mesothelioma referrals. (*Id.*). As Dr. Taub put it in a contemporaneous email to a colleague, "If [Silver] delivers, I am sure it will cost me." (A. 1772; *see also* A. 1771). Dr. Taub explained: "I thought that the basis of the relationship between us had to do with the referrals and the referrals were key, and I felt that it was his opinion

that if he did something, he would expect some recompense." (A. 524).

In May 2012, starting one day after Dr. Taub had sent Silver another valuable referral that generated over $170,000 in fees for Silver, Silver repeatedly sought to obtain a job for Dr. Taub's son with OHEL Children's Home & Family Services ("OHEL"), a not-for-profit organization that was reliant on Silver for state funding. (A. 501, 538-39, 695-97, 1235, 1840). Silver had never asked OHEL to hire anyone else. (A. 696).

Silver received more than $3 million in corrupt referral fees through his *quid pro quo* relationship with Dr. Taub. Dr. Taub continued providing mesothelioma leads to Silver through at least 2013, and mail and wire communications related to the scheme continued through that period. (A. 1840, 1842).

Silver concealed his lucrative and corrupt relationship with Dr. Taub. Knowing that W&L had a policy against conflicts of interest with the state, Silver never disclosed to his firm the acts he was performing for Dr. Taub. (A. 608-09). He similarly hid his corrupt relationship from fellow Assembly members, Assembly staff, and the state employees responsible for administering the grants and other benefits Silver relied on to maintain the relationship. (A. 413, 534, 592). Silver also omitted from his financial disclosure forms that his compensation as a lawyer included referral fees for asbestos cases. (A. 933-35, 1824-26). And he lied to the public, both directly and through his press officer, saying that he obtained legal fees by spending multiple hours each week evaluating potential cases when, in

truth, he jotted down the prospective client's contact information on a Post-it Note, and then handed the leads to the W&L lawyers who were competent to analyze and litigate the claims. (A. 428).

In 2014, federal agents interviewed Dr. Taub and asked about his referrals to Silver. (A. 491). Dr. Taub lied, saying that he had not referred any patients to Silver (even though he had referred dozens). (*Id.*). When the interview ended, Dr. Taub called Silver and told him that he had just had a "bikur cholim"—a Hebrew term that Dr. Taub chose to signal that the questioning had "rendered" him "ill." (*Id.*). Silver understood the gravity, and asked Dr. Taub whether he "had told the agents anything." Dr. Taub responded, "I don't think so." (*Id.*).

3. The Real Estate Scheme

In the second of the corrupt schemes—the Real Estate Scheme—Silver agreed to and did take official action on behalf of two real estate developers, Glenwood Management ("Glenwood") and the Witkoff Group ("Witkoff"), in exchange for personal financial benefits in the form of attorney referral fees. The developers were heavily dependent on the state legislature for favorable rent regulation and tax abatement legislation and on the PACB for tax-exempt financing —all matters over which Silver had enormous power. (A. 725). Indeed, Silver personally supervised negotiations regarding real estate-related legislation, including legislation concerning the 421-a tax exemption program and rent regulation, which were critical to Glenwood's financial health. (A. 407, 1781, 1792). So

immense was Silver's power that he could unilaterally prevent legislation that he opposed from coming to a vote on the Assembly floor, and he also could veto any state financing application before the PACB. (A. 725, 921).

The evidence at trial showed that Silver crafted an arrangement with Jay Arthur Goldberg, a friend and former Assembly staffer who worked in the tax certiorari field, in which Silver would receive a portion of any fees that Goldberg collected from business that Silver steered to the firm. Tax certiorari work is basic; the lawyers who do the work are highly fungible. (A. 775, 799, 802). Silver took advantage of the fungible nature of the business, and Glenwood and Witkoff's dependence on him, to enrich himself by steering Glenwood and Witkoff to Goldberg's firm (A. 798), which in turn paid Silver approximately $800,000 over the course of the scheme (A. 1841).

Initially, neither Glenwood nor Witkoff knew that Silver was taking a portion of their legal fees for himself. They thought they were financially benefitting Silver's friend (Goldberg) at Silver's request. Witkoff complied with Silver's request because, as Steven Witkoff put it, Silver was "a powerful man" who he did not want to "alienate" because Silver could affect "my industry, my business and how I exist in my business in the city." (A. 798).

But the developers did not stop paying Silver when they learned in late 2011 that Silver was using their fees to line his own pockets. Leonard Litwin, Glenwood's owner and primary decision-maker, decided to keep paying Silver because "he was concerned"

that there would be "repercussions legislatively" if the company cut Silver off. (A. 825). Fearing Silver's official power, Glenwood and Silver formalized their corrupt arrangement with a secret side letter, which Silver signed on a street corner in lower Manhattan. (A. 898, 1777). Glenwood then concealed the side letter from everyone—including its own Vice President of Finance. (A. 780-81). Indeed, days after Silver and Glenwood inked the secret side letter, Glenwood steered six new buildings to Goldberg for tax certiorari representation—benefitting Silver once again. (A. 899).

The evidence showed that Silver took a number of official acts that benefited Glenwood and Witkoff. Silver voted (through a proxy) as one of three voting members of the PACB to approve Glenwood's request for more than one billion dollars in tax-exempt state financing for its projects. (A. 1843). He also personally signed off on rent and tax abatement legislation that left Glenwood "satisfied." (A. 818). Glenwood rewarded Silver for taking official action that benefitted its business. Each time Silver pushed through legislation extending the 421-a tax exemption, Glenwood steered more tax certiorari business to Goldberg. (A. 1778).

As with the Asbestos Scheme, Silver concealed the Real Estate Scheme through lies that continued until soon before his arrest. Silver hid from his fellow legislators that he was receiving hundreds of thousands of dollars from Glenwood's business at the same time he was passing legislation favorable to it, and he hid from the PACB that he was benefitting personally from

Glenwood's largesse at the same time he was approving over $1 billion in state financing for Glenwood. (A. 408, 924). Through his press secretary and direct communications with the press and public, Silver lied about the source of his income, saying, for example, that his clients were "little people" and that he did not represent "corporations" or "entities that are, uh, um, you know, involved in the legislative process" or "had an impact on anything we do legislatively." (A. 2139). Silver's annual financial disclosures never revealed that Goldberg's firm (or any firm other than W&L) was a source of outside income, or that Silver received any income connected to the real estate industry. (A. 933-34, 1017). While Silver was concealing his *quid pro quo* relationship with the developers, he was professing to the public that "disclosure" was "the key" to avoiding corruption because it "prevents activities that may be in conflict" with an official's public obligations. (A. 2139).

4. The Money Laundering Scheme

Silver laundered the proceeds of these two schemes through investments in high-yield, private investment vehicles to which he gained access through Jordan Levy, a private investor who became Silver's close personal friend. (A. 907). Silver concealed from Levy the source of the funds he sought to invest, and instructed Levy to divide the largest of his investments in half, placing one half in his wife's name, so that Silver would not be required to publicly disclose the full amount of his investment. (A. 912-13).

B. The Defense Case and the Verdict

The defense case consisted of three stipulations and accompanying documentary exhibits. (Tr. 1846). After deliberating for approximately a day, the jury returned a verdict of guilty on all counts. (Tr. 2088-90).

C. Sentencing and Post-Trial Motions

On July 27, 2018, the District Court denied Silver's post-trial motions for judgment of acquittal and a new trial, pursuant to Federal Rules of Criminal Procedure 29 and 33, and sentenced Silver to seven years' imprisonment, to be followed three years' supervised release. (SA 18-19, 80). The court also ordered Silver to forfeit more than $3.5 million, pay a $1.75 million fine, and pay a $700 special assessment. (SA 22-23, 80).

Following his sentencing, Silver moved for continuance of bail and a stay of his fine and forfeiture orders pending appeal, arguing that the court's failure to instruct the jury that it must find an "agreement" between Silver and his payors was legal error that raised a "substantial question of law" likely to result in reversal or vacatur of his conviction. (A. 351-52); *see* 18 U.S.C. § 3143(b)(1). The District Court denied the motion, finding "the law is clear that the Government need not prove an agreement or meeting of the minds between the bribe taker and the bribe giver," and that Silver accordingly had "not presented a close legal question." (A. 367). Silver appealed that ruling to this Court, which granted him a stay of his surrender date until seven days after the case is deemed submitted for

decision, "without prejudice to any other action on the matter by the Merits Panel at that time." (A. 2137).[4]

ARGUMENT

POINT I

Silver's Claims of Instructional Error Are Meritless

Silver's central claim is that the District Court should have instructed the jury that it needed to find that Silver had an "agreement" with his payors. (Br. 25-42). This argument, which Silver did not raise in his first appeal, runs contrary to the relevant statutory text and governing case law. Although bribery and extortion cases sometimes refer to "agreement," context confirms that use of the term is not—absent a conspiracy charge or theory—intended to require a meeting of the minds between the bribe recipient and bribe giver. In any event, even were Silver correct, the instructional error he asserts was harmless.

Silver's second claim of instructional error, which likewise was not raised in his first appeal, is equally baseless. This Court has already rejected a requirement "that a specific act be identified and directly linked to a benefit at the time the benefit is received," and has instead affirmed instructions permitting the

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[4] The Government respectfully submits that further bail pending appeal is not warranted here.

jury to find the requisite *quid pro quo* where "the public official understands that he or she is expected as a result of the payment to exercise particular kinds of influence . . . as specific opportunities arise." *United States v. Ganim*, 510 F.3d 134, 145 (2d Cir. 2007) (internal quotation marks omitted). Contrary to Silver's contention, nothing in *McDonnell* alters that well-settled law.

A. Applicable Law

1. Jury Instruction Challenges

This Court reviews *de novo* a defendant's claim of error in instructions to the jury. *United States v. Roy*, 783 F.3d 418, 420 (2d Cir. 2015). An "'instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform the jury on the law.'" *Id.* (quoting *United States v. Naiman*, 211 F.3d 40, 51 (2d Cir. 2000)). Where, as here, the defendant's claim is that the district court misled the jury by omitting an instruction that he requested, the defendant must demonstrate both that (1) he requested a charge that "'accurately represented the law in every respect'" and (2) the charge delivered, when viewed as a whole, was erroneous and prejudicial. *Id.* (quoting *United States v. Applins*, 637 F.3d 59, 72 (2d Cir. 2011)); *see also, e.g.*, *United States v. Nektalov*, 461 F.3d 309, 313-14 (2d Cir. 2006).

As to prejudice, reversal is not warranted if the error was harmless. *See* Fed. R. Crim. P. 52(a); *United States v. DeMizio*, 741 F.3d 373, 384 (2d Cir. 2014). Thus, a conviction should be affirmed despite instructional error if it "appears beyond a reasonable doubt

that the error complained of did not contribute to the verdict obtained." *Neder v. United States*, 527 U.S. 1, 15 (1999) (internal quotation marks omitted).

2. Honest Services Bribery

Sections 1341 and 1346 of Title 18 together criminalize "a scheme or artifice to deprive another of the intangible right to honest services" through use of the mails, while sections 1343 and 1346 together criminalize the same kind of scheme effected through interstate wire communications. Acts of bribery fall within these statutes. *See Skilling v. United States*, 561 U.S. 358, 408-09 (2010). In this case, as in other honest services cases involving public officials, the concept of "bribery" may be informed by reference to the definitions supplied in the general federal bribery statute, 18 U.S.C. § 201. *See, e.g.*, *McDonnell*, 136 S. Ct. at 2365. The provision of Section 201 that applies to public official defendants provides in pertinent part:

> Whoever . . . being a public official or person selected to be a public official, directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for . . . being influenced in the performance of any official act . . . [is guilty of a crime].

18 U.S.C. § 201(b)(2)(A).

3. Hobbs Act Extortion

The Hobbs Act makes it a crime to "obstruct[ ], delay[ ], or affect[ ] commerce or the movement of any article or commodity in commerce, by robbery or extortion," and defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(a), (b)(2). When the Government charges that a public official engaged in extortion "under color of official right" by soliciting or receiving bribes, it must demonstrate the existence of a *quid pro quo* akin to that involved in bribery. *Evans v. United States*, 504 U.S. 255, 268 (1992) (citing *McCormick v. United States*, 500 U.S. 257 (1991)); *see also McDonnell*, 136 S. Ct. at 2365. That is, the Government must show that the official "has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Evans*, 504 U.S. at 268.[5]

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[5] Where, as here, the payment does not take the form of a campaign contribution, the *quid pro quo* need not be "explicit." *Cf. McCormick*, 500 U.S. at 273 (in the campaign contribution context, payment must be "in return for an explicit promise or undertaking by the official to perform or not to perform an official act"); *see United States v. Garcia*, 992 F.2d 409, 414 (2d Cir. 1993) (explaining that *Evans* modified the *McCormick* "standard in non-campaign contribution cases by requiring that the government show only 'that a public official has obtained a payment to which he was not

4. Official Act

Under both the honest services fraud and the Hobbs Act extortion theories of bribery presented to the jury in this case, the Government was required to prove that Silver accepted payment in exchange for an "official act." An "official act" is defined under Section 201 as "any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." 18 U.S.C. § 201(a)(3).[6] Construing this language in light of constitutional vagueness concerns, the Supreme Court has further refined the definition of "official act" as follows:

First, "[t]he 'question, matter, cause, suit, proceeding or controversy' must involve a formal exercise of

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entitled, knowing that the payment was made in return for official acts'"); *see also Ganim*, 510 F.3d at 143.

[6] Neither the Supreme Court nor this Court has decided whether Section 201(a)(3) "must *necessarily* be the exclusive source for the definition of official action in every honest services fraud and Hobbs Act extortion case." *Silver*, 864 F.3d at 116 n.67 (emphasis in original). Silver's suggestion (Br. 45 n.13) that this Court held otherwise in *United States v. Boyland*, 862 F.3d 279 (2d Cir. 2017), is incorrect. *See Silver*, 864 F.3d at 116 n.67 & 118 n.84 (confirming that the question remains open).

governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee." *McDonnell*, 136 S. Ct. at 2372. This question, matter, cause, suit, proceeding or controversy "must also be something specific and focused that is 'pending' or 'may by law be brought' before a public official." *Id.*

Second, where the defendant is the alleged bribe recipient, he

> must make a decision or take an action on that "question, matter, cause, suit, proceeding or controversy," or agree to do so. Such an action or decision may include using [an] official position to exert pressure on another official to perform an "official act," or to advise another official, knowing or intending that such advice will form the basis for an "official act" by another official.

Id. "Without more, 'setting up a meeting, talking to another official, or organizing an event (or agreeing to do so),' are not official acts." *Silver*, 864 F.3d at 117 (quoting *McDonnell*, 136 S. Ct. at 2372).

5. "As Opportunities Arise"

Although the Government was required in this case to establish acceptance of a thing of value in exchange for an "official act," it was not required to demonstrate that the precise character of the official act or acts had been identified at the time payment was accepted. "[S]o long as the jury finds that an official accepted gifts in exchange for a promise to perform official acts

for the giver, it need not find that the specific act to be performed was identified at the time of the promise, nor need it link each specific benefit to a single act." *Ganim*, 510 F.3d at 147 (affirming Hobbs Act extortion and honest services bribery convictions predicated on theory of exchange for official acts as opportunities arose). That is because "bribery can be accomplished through an ongoing course of conduct, so long as the evidence shows that the favors and gifts flowing to a public official are in exchange for a pattern of official actions favorable to the donor." *Id.* at 149 (internal quotation marks, brackets, and emphasis omitted); *see also United States v. Rosen*, 716 F.3d 691, 700 (2d Cir. 2013); *United States v. Coyne*, 4 F.3d 100, 114 (2d Cir. 1993).

B. Relevant Facts

1. The Honest Services Fraud Instruction

As relevant here, with respect to honest services fraud, the District Court instructed:

> A bribe occurs when a public official corruptly seeks or accepts, directly or indirectly, something of value from another person with the intent to be influenced in the performance of his public duties.
>
> To satisfy this element, the government must prove that there was a quid pro quo. Quid pro quo is Latin, and it means "this for that" or "these for those." The government must prove that a bribe was sought

or received by Mr. Silver, directly or indirectly, in exchange for the promise or performance of official action. The government does not have to prove that there was an express or explicit agreement that official actions would be taken or that any particular action would be taken in exchange for the bribe.

. . .

The payment and receipt of a bribe are not interdependent offenses because the intent of the party giving the thing of value may be different from the intent of the party receiving the thing of value. Therefore, the government only has to prove that Mr. Silver—not the bribe giver—understood that, as a result of the bribe, he was expected to exercise official influence or take official action for the benefit of the payor and, at the time the bribe was accepted, intended to do so as specific opportunities arose.

If you find that Mr. Silver understood that the benefits were provided solely to cultivate goodwill or to nurture a relationship with the person or entity who provided the benefit, and not in exchange for any official action, then this element will not have been proven, even if Mr. Silver later performed some act that was beneficial to the payor. On the other hand, if you find that the government has

> proven that Mr. Silver accepted payments or things of value intending, at least in part, to take official action in return for those payments as the opportunity arose, then this element will have been proven.

(SA 30).

2. The Official Act Instruction

In light of *McDonnell*, the District Court further instructed:

> An "official act" or "official action" is a decision or action on a specific matter that may be pending or may by law be brought before a public official.
>
> An official act must involve a decision, an action, or an agreement to make a decision or to take an action. The decision or action may include using one's official position to exert pressure on or to order another to perform an official act. It may also include using one's official position to provide advice to another, knowing or intending that such advice will form the basis for an official act by another.
>
> The decision or action must be made on a question or matter that involves a formal exercise of governmental power. That means that the question or matter must be specific, focused, and concrete—for example, the kind of thing that could be put

> on an agenda and then checked off as complete. It must be something that may by law be brought before a public official, or may at some time be pending before a public official.
>
> In order to be "official action," the decision or action must be more than just setting up a meeting, consulting with a lobbyist or official, organizing an event, or expressing support for an idea. . . .

(SA 30-31).

3. The Extortion Instruction

As relevant here, with respect to extortion, the District Court instructed:

> [T]he government must prove beyond a reasonable doubt that Mr. Silver obtained property to which he was not entitled by his public office, knowing that it was given in return for official acts as the opportunity arose, rather than being given voluntarily and unrelated to Mr. Silver's public office. The government must also prove beyond a reasonable doubt that the extorted party was motivated, at least in part, by the expectation that as a result of the payment, Mr. Silver would exercise official influence or decision-making for the benefit of the extorted party, or would refrain from taking action to the detriment of the extorted

> party, and that Mr. Silver was aware of their motivation.
>
> If you find that Mr. Silver understood that the property at issue was given solely to cultivate goodwill or to nurture a relationship with the person or entity who gave the property and not as an exchange for any official action, then this element has not been proven, even if Mr. Silver later performed some act that was beneficial to the payor or refrained from taking some official action that would have been to the detriment of the payor. On the other hand, if you find that Mr. Silver accepted the property intending, at least in part, to take official action in exchange for those payments as the opportunity arose, then this element has been satisfied.

(SA 32-33).

C. Discussion

1. The District Court Properly Declined to Require an "Agreement"

Seizing on stray references to the word "agreement" in decisions of this Court and others, Silver contends that the District Court committed reversible error by declining to instruct the jury that it must find Silver had a meeting of the minds with his payors. He insists that a public official can be guilty of the crimes charged here only if his "*payor* intend[ed] to exchange

his payment for official acts," and that "[n]o decision of this Court supports" the contrary view. (Br. 30 (emphasis added)). None of this is correct.

To begin, although this Court and others have sometimes used the word "agreement" in describing the *quid pro quo* requirement of both honest services bribery and Hobbs Act extortion, it is clear that the term is used in this context to refer to the defendant's own *intent*. *See, e.g.*, *United States v. Ring*, 706 F.3d 460, 468 (D.C. Cir. Cir. 2013) (explaining that the word "agreement" in *United States v. Dean*, 629 F.3d 257 (D.C. Cir. 2011), a bribery case, was used simply "as a synonym for specific intent" and not to require a meeting of minds). Silver quotes this Court's statement in his first appeal that the Government must prove "the existence of a *quid pro quo* agreement." (Br. 25-26 (quoting *Silver*, 864 F.3d at 111)). But he lops off the part of the sentence which defines the "*quid pro quo* agreement" to mean simply "that the defendant received, or intended to receive, something of value in exchange for an official act." *Silver*, 864 F.3d at 111. In the same vein, Silver quotes the Court's statements in *Ganim* and *Rosen* that an "agreement may be implied from the defendant's words and actions" as imposing a meeting-of-minds requirement. (Br. 29 (quoting *Ganim*, 510 F.3d at 143, and *Rosen*, 716 F.3d at 701)). But he omits the Court's explanation in *Rosen* that the *Ganim* opinion had "defined" a "quid pro quo agreement" as "'a government official's receipt of a benefit in exchange for an act he has performed, or promised to perform, in the exercise of his official authority.'" *Rosen*, 716 F.3d at 700 (quoting *Ganim*, 510 F.3d at 141). Thus "defined," the term "agreement" requires no

meeting of minds but simply an understanding on the official's part that the payment is intended to generate official action by him (or forbearance therefrom). *See also, e.g.*, *United States v. Bruno*, 661 F.3d 733, 744 (2d Cir. 2011) (describing *quid pro quo* as an "agreement," but then stating that "[t]he key inquiry is whether, in light of all the evidence, an intent to give or receive something of value in exchange for an official act has been proved beyond a reasonable doubt").

And, of course, if this were all Silver meant by "agreement," then there would be no dispute and no remotely articulable claim of error. The District Court repeatedly instructed the jury, in connection with both honest services fraud and extortion, that it could not convict without finding that Silver understood he was receiving payment in exchange for official action. (*See* SA 30, 33; *e.g.*, SA 30 (for honest services, Government must prove "a bribe was sought or received by Mr. Silver, directly or indirectly, in exchange for the promise or performance of official action"); SA 33 (for extortion, Government must prove "that Mr. Silver obtained property to which he was not entitled by his public office, knowing that it was given in return for official acts as the opportunity arose, rather than being given voluntarily and unrelated to Mr. Silver's public office")). As these instructions convey, and as the Government agrees, a public official can be guilty of substantive bribery only if he solicits or receives or accepts payment *in exchange* for performing or promising performance of an official act. (*Cf.* Br. 30 (suggesting controversy on this point)). *McCormick* and *Evans* are pellucid about this requirement, and every pertinent decision of the Supreme Court and this

Court since has followed suit. *See, e.g.*, *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 404-05 (1999) ("for bribery there must be a *quid pro quo*—a specific intent to give or receive something of value *in exchange* for an official act"); *Bruno*, 661 F.3d at 743 ("A quid pro quo is a government official's receipt of a benefit in exchange for an act he has performed, or promised to perform, in the course of the exercise of his official authority."); *Ganim*, 510 F.3d at 148-49 (same).

But the law is likewise clear that the *quid pro quo* element may be satisfied by proof of the defendant's understanding of the purpose for which the payment is being offered or made. In demanding proof of a meeting of minds between the bribe payor and payee, and suggesting that a payee who accepts a bribe believing it to be a bribe has committed no crime unless his payor subjectively intends a bribe, Silver goes too far —well beyond what the relevant statutory text and case law will support.

First, Section 201(b)(2), which informs the definition of bribery for these purposes, makes it a crime for a public official to corruptly "agree[] to receive or accept anything of value . . . in return for . . . being influenced in the performance of any official act," but *also*, in the same sentence, makes it a crime for an official to "corruptly demand[], seek[], receive[], [or] accept[]" a thing of value under the same circumstances. Construing any of these other verbs to import a meeting-of-minds element would render them all superfluous, because the territory they occupy would already have been covered by the word "agree[]." Such a construction, running as it does contrary to Congress's

clear intent, is disfavored by "ordinary canons of statutory construction." *See United States v. Sheehan*, 838 F.3d 109, 124 (2d Cir. 2016). What is more, Silver's proffered construction would load only *some* of the verbs in the statutory string with an additional meeting-of-minds requirement, leaving others unburdened. Silver acknowledges, for example, that an official who "demand[s]" a bribe but is rebuffed is guilty notwithstanding the absence of "agreement." (Br. 35). Under Silver's construction, only those who—like himself—corruptly "seek[ ]," "accept[ ]," and "receive[ ]" payment in exchange for official acts are exempt absent proof of a meeting of the minds. But that arbitrary approach finds no support in the language of the statute. *See Ring*, 706 F.3d at 467 (rejecting argument that honest services bribery requires "agreement," because Section 201's text clearly criminalizes unilateral action on both sides of the bribe payment, "the act of offering a bribe and the act of soliciting or accepting a bribe").

Nor does it find support in governing case law, which only confirms the weakness of Silver's position. *Evans*, the seminal case framing the *quid pro quo* requirement in the non-campaign-contribution context, involved acceptance of bribes paid by someone who plainly lacked criminal intent. There can have been no meeting of the minds in that case, because the defendant public official accepted bribes from "an FBI agent posing as a real estate developer." *See Evans*, 504 U.S.

at 257.[7] Accordingly, in affirming the defendant's conviction and articulating the requisite *mens rea*, the Supreme Court did not—as Silver would have it—"analyze[]" the "intent . . . of the alleged bribe payor" (Br. 30), but instead held that "the Government need only show that [the] public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts." *Id.* at 268; *see also id.* at 274 (Kennedy, J., concurring in part and concurring in the judgment) ("a public official violates § 1951 if he intends the payor to believe that absent payment the official is likely to abuse his office and his trust to the detriment and injury of the prospective payor or to give the prospective payor less favorable treatment if the *quid pro quo* is not satisfied");

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[7] *Evans* is not unique in this respect. It is common in bribery investigations to use undercover law enforcement officers, confidential sources, or cooperating defendants. *See, e.g.*, *United States v. Halloran*, 664 F. App'x 23, 28 (2d Cir. 2016); *United States v. Guevara*, 96 F. App'x 745, 746 (2d Cir. 2004); *United States v. Brunshtein*, 344 F.3d 91, 95 (2d Cir. 2003); *United States v. Fasano*, 25 F. App'x 23, 24 (2d Cir. 2001); *Aksoy v. United States*, 101 F.3d 1393, 1996 WL 460791, at *1 (2d Cir. Aug. 14, 1996); *United States v. Falcioni*, 45 F.3d 24, 25 (2d Cir. 1995); *United States v. Romano*, 879 F.2d 1056, 1057 (2d Cir. 1989); *United States v. Pilarinos*, 864 F.2d 253, 254 (2d Cir. 1988); *United States v. Silvestri*, 719 F.2d 577, 579 (2d Cir. 1983); *United States v. Myers*, 692 F.2d 823, 827 (2d Cir. 1982).

United States v. Brewster, 408 U.S. 501, 526 (1972) ("The illegal conduct [under Section 201(b)(2)] is taking *or* agreeing to take money for a promise to act in a certain way." (emphasis added)); *United States v. Repak*, 852 F.3d 230, 250-51 (3rd Cir. 2017) (applying *Evans* to reject public official defendant's argument that he could not be convicted of Hobbs Act extortion for accepting bribes unless the Government established an "agreement"; holding that official's understanding sufficed to satisfy the *mens rea* requirement).[8]

The *Evans* Court's focus on the bribe payee's state of mind is consistent with the manner in which courts interpret the provision of Section 201 that criminalizes bribe offering and paying. Several courts, including this one, have confirmed that no meeting of the minds is needed to sustain a conviction under Section 201(b)(1). *See, e.g.*, *United States v. Gallo*, 863 F.2d 185, 189 (2d Cir. 1988) (for bribe offeror to have requisite intent, "the public official who is the target of the

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[8] The text of 18 U.S.C. § 666, which is not at issue in this appeal, similarly criminalizes the corrupt "accept[ance]" or "agree[ment] to accept" a bribe, and thus does not require a meeting of the minds. *See United States v. Morgan*, 635 F. App'x 423, 431 (10th Cir. 2015) (The question "is not whether both [the official] *and* [the party paying] had a corrupt intent but *whether [the official] had a corrupt intent*—whether he had the intent to receive the retainer fees [at issue] in exchange for his legislative influence." (emphases in original)).

bribe need not be aware of the bribe"); *United States v. Suhl*, 885 F.3d 1106, 1113 (8th Cir. 2018) ("A payor defendant completes the crimes of honest-services and federal-funds bribery as soon as he gives or offers payment in exchange for an official act, even if the payee does nothing or immediately turns him in to law enforcement."), *cert. denied*, No. 17-1687, 2018 WL 3055790 (U.S. Oct. 1, 2018); *Ring*, 706 F.3d at 467. Silver cites no principled basis, and the Government is aware of none, for adopting a different approach for those who demand, solicit, receive, or accept bribes, understanding them to have been offered in exchange for official action. *Cf. Sun-Diamond*, 526 U.S. at 404-05 (defining bribery on both sides to require "a specific intent to *give or receive* something of value *in exchange* for an official act" (first emphasis added)).

Not surprisingly, in light of the foregoing, Silver cites no case in which a court invalidated a public official's bribery conviction because his payor (or would-be payor) lacked a corrupt intent. This is not to say that a payor's intent is necessarily irrelevant, or that the cases so treat it. (*Cf.* Br. 1, 18, 19, 37, 38 (asserting, incorrectly, that the District Court instructed the jury that the bribe payor's intent was "irrelevant")). Such intent may well be relevant in establishing the payee's own intent. *See, e.g.*, *Bruno*, 661 F.3d at 745 (in support of conclusion that evidence sufficed to demonstrate defendant "understood that the consulting payments were made in return for official action," citing facts, observable to defendant, demonstrating that payor's purpose was in fact for defendant to "use his office to further the interests" of payor). And of course the payor's intent may be relevant to support a theory

that the parties *agreed* to a bribe scheme, in a case where the Government pursues such a theory. *See, e.g.*, *United States v. Terry*, 707 F.3d 607, 612-15 (6th Cir. 2013) (where defendant official charged with conspiracy and substantive bribery offenses, detailing evidence supporting jury's conclusion that agreement had been reached with payor). But just because Section 201(b)(2)—and other statutes, like 18 U.S.C. § 1951—criminalize bribery agreements does not mean they do so to the *exclusion* of all substantive liability theories.[9]

Finally, contrary to Silver's suggestion, there is no danger in applying the statute's plain meaning. The slippery-slope factual scenario Silver posits, in which an official who accepts "any income or benefit" in the ordinary course can be found guilty of bribery if a jury believes he "later acted with less-than-fully admirable motivations" (Br. 33), is—to put it mildly—puzzling.

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[9] Indeed, Silver's approach, if adopted, would eliminate the distinction between conspiracy and substantive violations for all bribery offenses, no matter how charged. But "[i]t has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." *Pinkerton v. United States*, 328 U.S. 640, 643 (1946); *see also, e.g.*, *Callanan v. United States*, 364 U.S. 587, 593 (1961); *Garrett v. United States*, 471 U.S. 773, 778 (1985). There is no indication that Congress intended to eliminate the distinction here—just the opposite.

Accepting a bribe with the contemporaneous understanding that the payor expects official action in return is not a case of "later" acting with "less-than-fully admirable motivations"; it is instead, and has long been, a crime. *See Skilling*, 561 U.S. at 412 ("it has always been as plain as a pikestaff that bribes and kickbacks" are criminal (internal quotation marks omitted)). By the same token, an official who accepts payment without such an understanding is not guilty of bribery.

2. Even Assuming a Meeting of Minds Is Required, the Extortion Instruction Contained that Requirement

Even assuming *arguendo* that the jury was required to find that Silver reached an "agreement" with his payors and that "the payors must have intended to obtain 'official acts' in exchange for the benefits they provided" (Br. 36-37 & n.9), the District Court's instruction on the extortion counts adequately conveyed such a requirement. Specifically, the District Court told the jury that to convict it must find "the extorted party"—that is, the payor—"was motivated, at least in part, by the expectation that as a result of the payment, Mr. Silver would exercise official influence or decision-making for the benefit of the extorted party, or would refrain from taking action to the detriment of the extorted party, and that Mr. Silver was aware of their motivation." (SA 33). To reach its verdict of guilty on the Hobbs Act counts, the jury thus necessarily found that the payors expected official action as a result of their payments, *and* that Silver knew as

much.[10] Although the District Court's instruction did not use the word "agreement," it nonetheless conveyed a need to find a meeting of the minds. *See United States v. Schultz*, 333 F.3d 393, 413-14 (2d Cir. 2003) (question is "whether considered as a whole, the instruction[ ] adequately communicated the essential idea[ ] to the jury" (internal quotation marks and brackets omitted)).[11] As to the extortion counts, therefore, Silver's instructional error claim fails even if he

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[10] The District Court, in its decision denying Silver's motion for bail pending appeal, expressed the view that its extortion instruction did not convey a meeting-of-minds requirement but merely required the jury to find Silver's "awareness of [his] target's motivation." (A. 367). Viewed as a whole, however, the instruction did much more than that, requiring that the payor *in fact* make the payment with the expectation of official action *and* that the payee know of that motivation *and* that the payee accept the payment with an understanding of the payor's motivation.

[11] Silver suggests that, even if the District Court's instructions otherwise were proper in this respect, vacatur is required because the Government focused its arguments on Silver's intent, not those of his payors. (Br. 38-39). But of course the Government so focused in a single-defendant case, Silver did not object to the arguments which he points (which he in any event excerpts in a misleading manner), and the law does not require that all arguments in a jury address, by either side, in and of themselves, capture all aspects of the

is right about the law requiring a meeting of the minds.

3. The Extortion Instruction Rendered Any Error Harmless on All Counts

At a minimum, the jury's conviction of Silver on the extortion counts after having received the above-described instruction establishes beyond cavil that its verdict would have been the same—on both the extortion and the honest services counts—had it received Silver's preferred "agreement" instruction. *See Neder*, 527 U.S. at 15 (the question "is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained" (internal quotation marks omitted)); *cf. United States v. Nouri*, 711 F.3d 129, 140 (2d Cir. 2013) ("We have no doubt that, had the jury been properly instructed, it would have found the defendants guilty of honest-services wire fraud based on their scheme of concealed bribery. The most persuasive demonstration comes from the fact that the jury *did* find [the defendants] guilty of violating the commercial bribery statute, based on the same facts."). Having found, with respect to both the Asbestos Scheme and the Real Estate Scheme, that (1) Silver accepted bribes "knowing [they were] given in return for official acts as the opportunity arose"; (2) the payors were in fact "motivated, at least in part, by the expectation" of official action; and (3) Silver was "aware of their motivation" (SA 33), there can be no

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relevant law. *See, e.g.*, *United States v. Arboleda*, 20 F.3d 58, 61 (2d Cir. 1994).

question that the jury would still have convicted on these counts had it heard Silver's preferred formulation—namely, that "a *quid pro quo* agreement was required for conviction," or, "at a minimum," that "the payors must have intended to obtain 'official acts' in exchange for the benefits they provided." (Br. 37 n.9).

4. Even Disregarding the Extortion Instruction, No Rational Jury Could Have Found an Absence of Agreement Regarding the Asbestos Scheme

Wholly apart from the foregoing, any error in failing to adequately convey an alleged meeting-of-minds requirement was harmless with respect to the Asbestos Scheme counts because it is clear beyond a reasonable doubt that a rational jury applying such a requirement to that scheme would have found the additional element satisfied. The evidence that Silver's payor intended to obtain official acts in exchange for the benefits he provided—that is, that an "agreement" was reached in the sense Silver would require—was overwhelming.

Dr. Taub, whose credibility Silver did not challenge, testified at length about the contours of his corrupt relationship with Silver, including that he and Silver had an "implicit understanding" that he would exchange mesothelioma referrals for official action. (A. 489, *see also, e.g.*, A. 516). Silver's assertion that Dr. Taub testified that he only "referred patients for other reasons" (Br. 39) is false, as set forth at some length above. (*See, e.g.*, A. 489, 496, 505, 510, 516). The understanding that Dr. Taub shared with Silver was

rooted in the kind of "knowing winks and nods" common in corruption schemes. *See Evans*, 504 U.S. at 274 (Kennedy, J., concurring in part and concurring in the judgment). As Dr. Taub put it: "Mr. Silver just did not articulate or express clearly what his needs were, but somehow we got the idea. . . . When he felt he should get more cases, he just mentioned casually that the referrals were not as great as they were before. So we were led to infer these things. We got the idea, although it was not clearly expressed." (A. 509).

But the Government's proof extended well beyond Dr. Taub's description of his corrupt relationship with Silver. Silver requested referrals from Dr. Taub "a few days" after Dr. Taub initially requested mesothelioma funding from Silver. (A. 446). Silver then directed Dr. Taub write him a letter seeking state funding within months of when Dr. Taub began sending referrals to Silver. (A. 447). Silver then steered the first $250,000 state grant to Dr. Taub's mesothelioma center only *after* he received a $176,048.02 check generated by Dr. Taub's referrals. (A. 497, 620-21, 1840).

Dr. Taub's contemporaneous communications also demonstrated the corrupt agreement. As noted above, in 2010, Dr. Taub wrote: "I will keep giving cases to Shelly because I may need him in the future—he is the most powerful man in New York State." (A. 1775). The following year, when Dr. Taub sought Silver's official assistance with permits, Dr. Taub wrote: "If he delivers, I am sure it will cost me." (A. 1772). Dr. Taub testified that by "cost me," he meant that Silver "would undoubtedly importune us, importune me, for additional referrals." (A. 508; *see also* A. 510).

Silver suggests that certain of this evidence should be discounted or ignored because some of it concerned events that took place outside of the statute of limitations (Br. 39), but this Court held in Silver's first appeal that the Government "need only prove that some aspect of the particular *quid pro quo* scheme continued into the statute of limitations period," *Silver*, 864 F.3d at 122, the District Court so instructed (*see* A. 1148), and the evidence that the scheme continued well into the limitations period was overwhelming.

5. *McDonnell* Does Not Invalidate the "As Opportunities Arise" Theory of Bribery

Finally, the Court should reject Silver's argument that the District Court erred in charging the jury it could convict based on an exchange for official acts taken "as opportunities arose." This Court has repeatedly affirmed the validity of this theory, and *McDonnell* does not disturb that settled law.

In *Ganim*, this Court addressed "whether proof of a government official's promise to perform a future, but unspecified, official act is sufficient to demonstrate the requisite quid pro quo for a conviction" for Hobbs Act extortion and honest services fraud. 510 F.3d at 141-42. The Court rejected the defendant's argument that "a direct link must exist between a benefit received and a specifically identified official act," and held that "the requisite quid pro quo for the crimes at issue may be satisfied upon a showing that a government official

received a benefit in exchange for his promise to perform official acts . . . as the opportunities arose." *Id.* at 142.[12]

The Court reaffirmed this precedent several years later, explaining:

> We have made it crystal clear that the federal bribery and honest services fraud statutes that [the defendant] was convicted of violating criminalize schemes involving payments at regular intervals in exchange for specific official acts as the opportunities to commit those acts arise, even if the opportunity to undertake the requested act has not arisen, . . . and even if the payment is not exchanged for a particular act but given with the expectation that the official will exercise particular kinds of influence.

Rosen, 716 F.3d at 700 (internal quotation marks, citations, and brackets omitted).

McDonnell does not alter this analysis. *McDonnell* concerned the definition of "official act"—*i.e.*, the *quo* in a *quid pro quo* exchange. The Supreme Court held that the term "official act" refers to a decision or action on a question or matter that "must involve a formal exercise of governmental power" and "must also be something specific and focused that is 'pending' or

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[12] Courts have variously described this theory of liability as the "retainer theory," "stream of benefits theory," or "as opportunities arise theory."

'may by law be brought' before a public official." 136 S. Ct. at 2371. The Court explained that "[s]etting up a meeting, talking to another official, or organizing an event," without more, does not qualify as an official act. *Id.* at 2372. Similarly, "merely arranging a meeting or hosting an event to discuss a matter does not count as a decision or action on that matter." *Id.* at 2375. At no point, however, did the Court indicate that the specific "official act" to be performed must be *identified* at the time the corrupt bargain is struck. *See Centurion v. Holder*, 755 F.3d 115, 123 (2d Cir. 2014) ("We are bound by our own precedent unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this court *en banc*." (internal quotation marks and alteration omitted)).[13]

Every court to have considered whether *McDonnell*'s logic nonetheless compels pre-identification of the official act(s) has held that it does not. The First Circuit recently rejected the conclusion that *McDonnell* implicitly overruled the retainer theory, stating that "we remain confident that a 'stream of benefits' theory of bribery remains valid today." *Woodward v. United States*, 905 F.3d 40, 48 (1st Cir. 2018). Every district court to have considered the question—including the District Court here—has agreed. *See, e.g.*, *United States v. Gordon*, 2018 WL 3067739,

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[13] Indeed, in *McDonnell*, the Supreme Court noted that the jury instructions included the "as opportunities arise" theory, but the opinion made no other mention of this fact and did not opine on the continuing validity of such an instruction. 136 S. Ct. at 2364-65.

at *5-6 (N.D. Ga. Jun. 21, 2018); *United States v. Skelos*, 2018 WL 2849712, at *3 (S.D.N.Y. Jun. 8, 2018); *Miserendino v. United States*, 307 F. Supp. 3d 480, 493-94 (E.D. Va. 2018); *United States v. Silver*, 2018 WL 1406617, at *4 (S.D.N.Y. Mar. 20, 2018); *United States v. Mangano*, 2018 WL 851860, at *4 (E.D.N.Y. Feb. 9, 2018); *United States v. Menendez*, 291 F. Supp. 3d 606, 613-16 (D.N.J. 2018); *United States v. Percoco*, 2017 WL 6314146, at *5 (S.D.N.Y. Dec. 11, 2017); *United States v. Fattah*, 223 F. Supp. 3d 336, 363 (E.D. Pa. 2016), *rev'd in part on other grounds*, 902 F.3d 197 (3d Cir. 2018). And although not expressly considering the question, this Court and other circuit courts have continued to apply the retainer theory after *McDonnell*. *United States v. Skelos*, 707 F. App'x 733, 738-39 (2d Cir. 2017) (citing retainer theory in rejecting sufficiency challenge); *Suhl*, 885 F.3d at 1115; *Repak*, 852 F.3d at 251.

None of the arguments Silver advances for jettisoning the retainer theory is tenable.

First, Silver is wrong that *McDonnell*'s restrictions upon the kinds of acts that qualify as "official" render the retainer theory "incoherent." (Br. 44-45). While of course "an agreement to provide a stream of indeterminate favors is not an agreement to perform 'official acts'" (Br. 45 (emphasis omitted)) under *McDonnell*, that by no means forecloses the theory the District Court actually presented to the jury. The court did not tell the jury it could convict based on "a stream of indeterminate favors," or anything of the sort. Rather, each time the court mentioned the retainer theory, it emphasized that the stream must consist of "official

acts." (*See* SA 30, 32, 33). Thus, the instructions accurately informed the jury that it had to find that the *quo* in the *quid pro quo* included a promise to "exercise particular kinds of influence," *Rosen*, 716 F.3d at 700 (internal quotation marks omitted), "involv[ing] a formal exercise of governmental power," and "something specific and focused that is 'pending' or 'may by law be brought' before a public official," *McDonnell*, 136 S. Ct. at 2371.

Relatedly, there is no merit to Silver's claim that it is "impossible" to determine whether the *quo* was an official act "unless the nature of the (allegedly) promised acts was identified at the time of the exchange." (Br. 45). A public official soliciting or accepting a bribe from an executive could rely on the fact that the official periodically votes on legislation critical to the executive's industry (like the real estate legislation shaped and voted upon every few years by Silver). What specific bill might come to the floor, or what the official's position on such a bill should be, might not be known at the time. But if the official accepted payment from the executive with the understanding that, as such bills came before him, the official was expected to shape or vote on it in the executive's desired manner, that would certainly be a bribe. As this Court has explained, "so long as the jury finds that an official accepted gifts in exchange for a promise to perform official acts for the giver, it need not find that the specific act to be performed was identified at the time of the specific promise." *Ganim*, 510 F.3d at 147.

Second, Silver is wrong that the *McDonnell* Court's description of "the basic framework of bribery cases"

somehow excludes the retainer theory. (Br. 47). This is no more than an attempt to piece together disparate quotations from the *McDonnell* opinion—the phrase "specific and focused," for example—in support of a conclusion that the opinion simply does not reach. As one court has explained in rejecting a similar attempt:

> The Government has always been required to prove that a public official "agreed to perform an 'official act' at the time of the alleged quid pro quo." . . . That the official acts ultimately taken by the public official must be "specific and focused" under *McDonnell* in no way imposes a requirement that they be precisely identified at the time the agreement is made.

Menendez, 291 F. Supp. 3d at 614-15.

Third, Silver's argument that *Sun-Diamond* forecloses the retainer theory (*see* Br. 46) has already been rejected by this Court. *See Ganim*, 510 F.3d at 146-47. As the *Ganim* Court explained, *Sun-Diamond* construed not the bribery statute, but the unlawful gratuities statute, which contains a phrase—"for or because of any official act," 18 U.S.C. § 201(c)(1)(A)—not found in the bribery statute. Accordingly, *Sun-Diamond*'s conclusion that the Government "must prove a link between a thing of value conferred upon a public official and a specific 'official act' *for or because of* which it was given," 526 U.S. at 414 (emphasis added), does not by its terms carry over to bribery cases, whether prosecuted under Section 201, the honest services statute, or the Hobbs Act. *See Ganim*, 510 F.3d at 146; *see also*

Sun-Diamond, 526 U.S. at 404-05 (noting the distinction between gratuities and bribery).[14]

Nor, as the *Ganim* Court explained, would it make sense to carry such a requirement over to the bribery context. *Sun-Diamond* articulated what the Court deemed a necessary limiting principle "to distinguish legal gratuities (given to curry favor because of an official's position) from illegal gratuities (given because of a specific act)." *Ganim*, 510 F.3d at 146. In the extortion or bribery context, by contrast, the limiting principle is supplied by the *quid pro quo* element itself —"the requirement of an intent to perform an act in exchange for a benefit." *Id.* at 146-47; *see also Sun-Diamond*, 526 U.S. at 404-05 (distinguishing language of bribery and gratuities provision and noting that bribery requires *quid pro quo*).[15]

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[14] Silver cites a footnote in *United States v. Bahel*, 662 F.3d 610, 635 n.6 (2d Cir. 2011), and claims that it "confirm[s]" that bribery as codified in Section 201 "requires that 'a specific act to be completed must be identified at the time of the promise.'" (Br. 46 (quoting *Bahel*)). *Bahel* did no such thing. The quoted footnote simply cites to the discussion in *Ganim* that distinguishes the language of Section 201's *gratuities* provision from the language of the Hobbs Act extortion and other bribery statutes involved in *Ganim*.

[15] Silver also argues that a Section 201(c) illegal gratuity is a lesser-included offense of Section 201(b) bribery, which "could not be so if § 201(c) required identification of a specific official act, and § 201(b) did

Finally, dispensing with the retainer theory of bribery would have profound negative consequences. As this Court explained in *Ganim*, the rule that Silver now seeks "could subvert the ends of justice." 510 F.3d at 147. That is because it is no less corrupt and no less criminal for a politician to be put on "retainer" for future official actions than it is for the politician to specify the action at the time of the payment. *Id.* ("[A] scheme involving payments at regular intervals in exchange for specific official acts as the opportunities to commit those acts arise does not dilute the requisite criminal intent or make the scheme any less 'extortionate.' "). This sort of scheme is, unfortunately, very common, as evidenced by the numerous district court decisions to have considered the issue recently, *see supra* pp. 46-47, as well as by this Court's prior decisions. *See, e.g.*, *Ganim*, 510 F.3d at 141-42; *Rosen*, 716 F.3d at 700. Yet under Silver's reading, only bribe payors with the omniscience to predict and identify with specificity which issues will arise in the future, and when, are guilty, while those without such foresight who simply pay public officials on "retainer" to be called into official action as opportunities arise are not. An official who wants to skirt the law can just keep his or her options open—intend to continue taking official action, without limiting the planned corrupt exchange to

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not." (Br. 46). But this Court has held that "the inclusion of possible or alternative elements in the crime of paying an illegal gratuity does not preclude it from being a lesser included offense to bribery." *United States v. Alfisi*, 308 F.3d 144, 151 n.6 (2d Cir. 2002).

a particular act or acts. *McDonnell* does not create this gaping loophole, and it is not the law in this Circuit. This Court should decline Silver's invitation to "legalize some of the most pervasive and entrenched corruption." *Ganim*, 510 F.3d at 147.

POINT II

Sufficient Evidence Supported Silver's Conviction on All Counts

In Silver's first appeal, this Court rejected his argument that the evidence was insufficient to establish acceptance of bribes and extortion payments in exchange for official acts, holding only that it was not clear beyond a reasonable doubt that a rational jury instructed in accordance with *McDonnell*'s definition of "official act" necessarily would have convicted. *See Silver*, 864 F.3d at 115. To the extent Silver appears to resurrect his original sufficiency challenge (*see* Br. 53-59), his claim fails for the same reasons it failed the first time. Drawing all inferences in the Government's favor, as is required, the evidence was certainly sufficient to permit a rational juror to conclude that Silver accepted payments as part of a *quid pro quo*—in connection with both the Asbestos Scheme and the Real Estate Scheme. *See, e.g.*, *United States v. Spoor*, 904 F.3d 141, 148 (2d Cir. 2018) (a defendant challenging sufficiency of the evidence "carries a heavy burden," as the reviewing court "must view the evidence in the light most favorable to the prosecution and draw all inferences in favor of the Government" (internal quotation marks omitted)); *United States v. Rahman*, 189 F.3d 88, 122-23 (2d Cir. 1999) (court "must consider

the evidence as a whole, and not as individual pieces, and remember that the jury is entitled to base its decision on reasonable inferences from circumstantial evidence").

Silver does not offer cogent argument to the contrary. Rather, his principal contention with respect to sufficiency in this appeal seems to be a challenge to the evidence as measured against the requirements that he now claims—but did not claim on his first appeal—should have been conveyed to the jury: a meeting of the minds and pre-identification and specification of the official act(s). (*See* Br. 47-53 (challenging sufficiency of the evidence assuming no retainer theory); *id.* at 53-59 (challenging sufficiency assuming retainer theory is valid but "agreement" is required)).

As to the "agreement" requirement that Silver would read into the law, the evidence was plainly sufficient to establish its existence with respect to both schemes. Indeed, as discussed above, the evidence supporting a meeting of the minds between Silver and Dr. Taub was so overwhelming that no rational jury could have found the absence of agreement with respect to the Asbestos Scheme. *See supra* pp. 42-44.

The evidence was likewise sufficient to show that Silver and the payors in the Real Estate Scheme had at least an implicit *quid pro quo* agreement. Knowing that Glenwood and Witkoff depended on legislation and state financing that he controlled (*see, e.g.*, A. 798), Silver solicited these entities to shift fungible yet valuable tax certiorari business from other service providers to Goldberg, which paid Silver a cut of the resulting fees (the *quid*). (A. 727-28, 798-99, 886-89).

Silver reciprocated by engaging in official action (the *quo*). Glenwood's "one trick pony" business model was able to thrive because Silver supported and allowed legislation to pass the Assembly that left Glenwood "satisfied." (A. 818). Silver also approved over $1 billion in PACB financing for Glenwood during the charged period of the scheme. (A. 1843). That the private payments and official acts were not merely coincidental, but rather linked by a corrupt agreement on both sides, was established by testimony from Witkoff's and Glenwood's representatives that they sent their tax certiorari business to Goldberg at Silver's request (and kept sending that business) because they were concerned that refusal to do so would alienate Silver and thereby risk losing the favorable official action on which they relied. (*See, e.g.*, A. 798 (Witkoff testifying that one of the reasons for hiring Goldberg's firm was because he "didn't want to do anything that could possibly alienate Mr. Silver"); A. 823 (Runes testifying that when he learned that Silver was getting referral fees, having known and worked with Silver for years, Runes was concerned about how Silver would "[r]eact towards Glenwood" if the fees stopped); A. 825 (Glenwood agreed to a continued financial arrangement with Silver because Litwin, who had also known Silver for years, was similarly concerned about how "Silver would view us if the relationship was terminated" and specifically "was concerned about would there be repercussions legislatively," that is, "[w]ith respect to its business")).

The temporal relationship between the payments to Silver and the official action he took further confirmed the existence of an agreement. Among other

things, (a) Goldberg received additional business from Glenwood each year Silver approved real estate legislation that was satisfactory to Glenwood (A. 899, 1778); (b) in late December 2011, Silver asked Glenwood to sign off on ongoing payments within months of 2011 real estate legislation that left Glenwood satisfied (A. 757, 826), and within days of Silver's favorable action concerning a planned methadone clinic in the vicinity of Glenwood's buildings (A. 1779); (c) Goldberg received additional business from Glenwood within days of Silver's signature of the secret side letter (A. 899); and (d) Silver approved hundreds of millions of dollars in PACB financing two months before and 10 months after his signature of the secret side letter. (A. 1843).

Similarly, even if Silver were correct that *McDonnell* should be read to eliminate the so-called retainer theory of bribery (although it said no such thing), the evidence was sufficient to establish that Silver accepted financial benefits in exchange for at least one identifiable official act with respect to both schemes. With respect to the Asbestos Scheme, the evidence demonstrated, first, that Silver intended to and did exchange referrals for HCRA grants, not merely unspecified future action. Indeed, Silver does not appear to dispute as much. (*See* Br. 24-25). He simply suggests that any such finding should not count, because Silver ceased providing grants outside of the statute of limitations. (Br. 48, 53). But, as noted, this Court held in Silver's first appeal that the Government "need only prove that some aspect of the particular *quid pro quo* scheme continued into the statute of limitations period," *Silver*, 864 F.3d at 122, and Silver was

still receiving fees, within the limitations period, for referrals made prior to the second HCRA grant. (*Compare, e.g.*, Add. 1-3, *with* Add. 4-6; *see also* A. 1840).

In any event, a rational jury could also have found that Silver accepted referrals not just in exchange for HCRA grants but also for at least one other, identified official act falling within the limitations period: assistance in securing permits for a charity race. As detailed above, Dr. Taub testified that in exchange for such assistance, he understood that Silver would expect referrals. (A. 509). As Dr. Taub put it in a contemporaneous email to a colleague about the permits, "If [Silver] delivers, I am sure it will cost me." (A. 1772; *see also* A. 1771).

With respect to the Real Estate Scheme, a rational jury could have found that Silver intended to and did exchange business brought to and kept at his friend's firm—from which Silver received a lucrative cut of the fees—in return for the identified acts of shaping and supporting real estate legislation. Particularly as to Glenwood, a rational jury easily could have found that when Litwin decided to keep paying Silver, pursuant to a secret side letter, because "he was concerned" that there would be "repercussions legislatively" if the company cut Silver off (A. 825), Silver understood that he was expected to support specific programs critical to Glenwood, such as 421-a, that needed to be renewed every few years. Indeed, at the time Glenwood agreed to sign the secret side letter, it had been lobbying Silver "[f]or quite a number of years" on such programs. (A. 876). A rational jury could have found that Silver understood precisely what was expected of him

—just as he had signed off on legislation with respect to the renewal of these programs that left Glenwood "satisfied" less than a year prior. (A. 818).

CONCLUSION

The judgment of conviction should be affirmed.

Dated: New York, New York
November 14, 2018

Respectfully submitted,

GEOFFREY S. BERMAN,
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and this Court's Local Rules. As measured by the word processing system used to prepare this brief, there are 13,976 words in this brief.

GEOFFREY S. BERMAN,
United States Attorney for the
Southern District of New York

By: SARAH K. EDDY,
Assistant United States Attorney

ADDENDUM

GOVERNMENT EXHIBIT 1405 S1 15 Cr. 093 (VEC)

DATA ENTRY – INITIAL INTAKE [redacted]

T# 101958

New - May work third case W/# 20733L Update

PERSONAL INFORMATION

Need signed retainer via FAX

CLIENT

Last Name: ~~Pipes~~ Pieper

First Name: DONALD F.

Address [redacted] WISCONSIN 53188-12[illegible]71

Telephone: (H) 262 548- [redacted]

(W)

DOB: [redacted]

SSN:

Sex: male

Living: yes

DOD:

Marital Status: Date of Marriage [redacted]

SPOUSE

Last Name: [redacted]

First Name: [redacted]

DOB: [redacted]

SSN: [redacted]

TYPE OF INTAKE

Intake: ref Intake Date: 11/18/04 Screening Location:

OCCUPATION

TRADE	JOB SITES	MILITARY
[redacted]	JOBSITE: (CITY, STATE: YEARS) [redacted]	[redacted]

RETAINER

Date: 11/20/04

Client Signed: y

Spouse Signed: y

Overall Client Retainer Fee: 1/3

Outside Referring Attorney: SHELDON SILVER Fee: 1/3

Inside Referring Attorney: Fee:

Cell # 262-35x- [redacted]

ESTATE

Estate Rep: Last: First:
Relationship to dec'd:
Address: Telephone:
Letters: Type: Test/Admin:
Title:

TYPE OF ACTION

STATE NY COUNTY NY DISTRICT_____ MARITIME_____
FEDERAL_____ REFERRED OUT___YES____NO RAILROAD_____
CCRonly___ BREAKLINING_____
FIBREBOARD:only_____ UPSTATE

SMOKING HISTORY [redacted]

MEDICAL

TESTING

Chest [redacted]
Diag Date:

ILO: Rating:
Narrative:

PFT: Restrictive:
Narrative: Dr:

DISEASE

Date of Diagnosis (M/D/YY)
1. Pleural___/___/____
2. Asbestos___/___/____
3. Lung Cancer___/___/____
4. Meso 9/24/04
5. Other Cancer___/___/____

Type:_____

STATUTE OF LIMITATION

STATE FOR SOL WISCONSIN
(SAME AS NY)

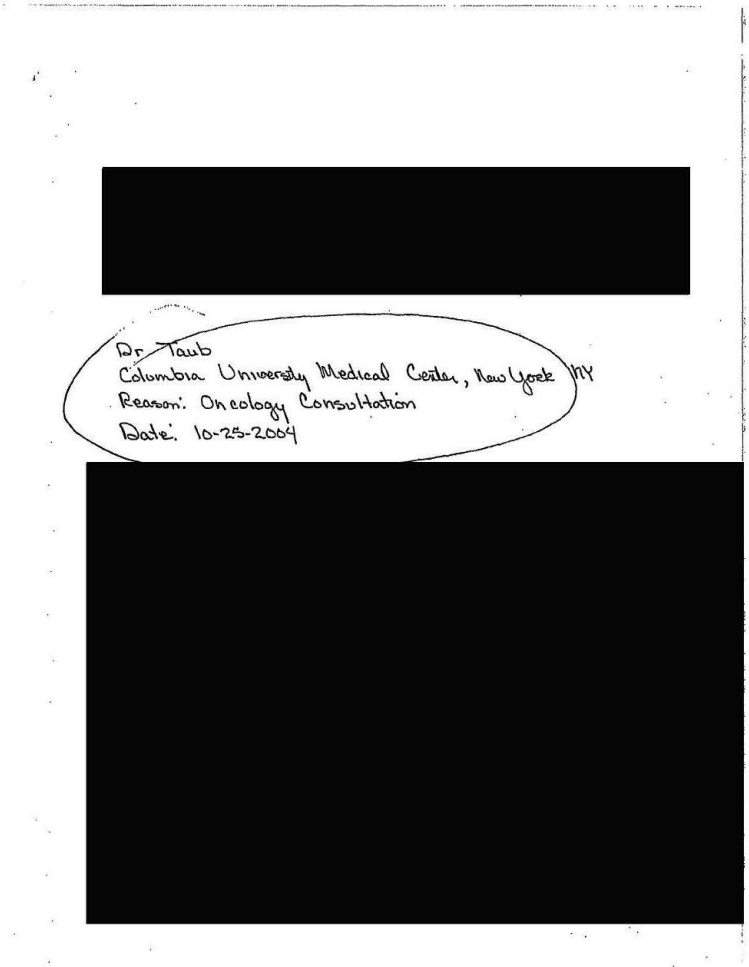
NEW CLIENT PACKAGE

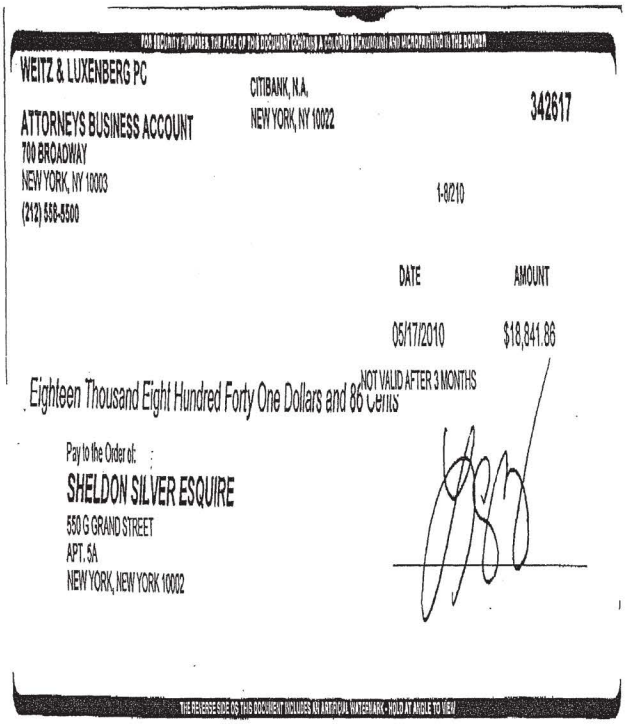
NCP sent 11/18/04 Positive/Negative letter sent:___/___/___
with Client retainer: Y/N
with Spouse retainer: Y/N Date Client Notified of W/C 11/29/04
NCP returned 11/21/04 Date Referring Attorney Notified: ___/___/___

OCA

Date OCA filed: ___/___/___ OCA number:_____

Prepared By: [signature] Date: 11/18/04 ~~11/18/04~~ 11/23/04
Entered By: Celeste King Date: ~~11/19/04~~ 11/29/04


Dr. Taub
Columbia University Medical Center, New York NY
Reason: Oncology Consultation
Date: 10-25-2004



FOR SECURITY PURPOSES, THE FACE OF THIS DOCUMENT CONTAINS A COLORED BACKGROUND AND MICROPRINTING IN THE BORDER

WEITZ & LUXENBERG PC

ATTORNEYS BUSINESS ACCOUNT
700 BROADWAY
NEW YORK, NY 10003
(212) 558-5500

CITIBANK, N.A.
NEW YORK, NY 10022

342617

1-0210

DATE	AMOUNT
05/17/2010	$18,841.86

NOT VALID AFTER 3 MONTHS

Eighteen Thousand Eight Hundred Forty One Dollars and 86 Cents

Pay to the Order of:
SHELDON SILVER ESQUIRE
550 G GRAND STREET
APT. 5A
NEW YORK, NEW YORK 10002

THE REVERSE SIDE OF THIS DOCUMENT INCLUDES AN ARTIFICIAL WATERMARK - HOLD AT ANGLE TO VIEW

⑈342617⑈ ⑆021000089⑆ 3740007 5⑈

GOVERNMENT
EXHIBIT
514-73
S1 15 Cr. 093 (VEC)

Attorney : **SHELDON SILVER ESQUIRE** *Paid Clients*

Defendant / *File #*	*Client Name*	*SSN*	*Lett. Code*	*Ret %*	*Distributed Amount*	*Ref. Att. Fee*	*Ref. Att. Expenses*	*Ref. Att. DIBA*	*Expenses*	*ReT Exp. Adj.*	*Retainer Amount*	*Lien*	*W&L Lien*	*Other Lien*	*Client Net*	*Escrow*	*Primary Attorney*
FIBREBOARD TRUST																	
200911	Evans, Monroe H	xxx-xx-0462	LAL	33.33	85,962.70	4,759.36	0.00	0.00	280.00		28,567.57	0.00	0.00	0.00	57,135.13	0.00	ZIFF LAW FIRM LLP
HARBISON WALKER TRUST (PART OF DII)																	
201331	Pieper, Donald F	xxx-xx-0932	FPR	33.33	126,703.20	14,074.48	0.00	0.00	32.92		42,223.43	0.00	0.00	0.00	84,446.85	0.00	
UNION CARBIDE																	
203244	Masullo, Pasquale	xxx-xx-3925		33.33	500.00	8.02	0.00	0.00	120.00		126.67	0.00	0.00	0.00	253.33	0.00	LAW OFFICES OF ANN-I
Total:					213,185.90	18,841.86	0.00	0.00	432.92	0.00	70,917.67	0.00	0.00	0.00	141,835.31	0.00	